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No. 84-564

In the Supreme Court of the United States

OCTOBER TERM, 1984

GERMANTOWN HOSPITAL AND MEDICAL CENTER, ET AL., PETITIONERS

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners, a group of Pennsylvania hospitals, seek review of the Secretary's disallowance of Medicare reimbursement for costs of providing care to indigent patients whom petitioners must serve without charge as a condition to receiving federal construction subsidies under the Hill-Burton Act, 42 U.S.C. 291 *et seq.* Petitioners challenge as unconstitutional the application to their claims of Section 106 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 337, which expressly ratifies the Secretary's consistent position that such reimbursement is not available under the Medicare statute.

1. Petitioners received federal financial assistance under the Hill-Burton program in connection with modernization and expansion of their facilities (Pet. App. 5a, 19a). As a

condition to receipt of the Hill-Burton funds, petitioners were required to provide a reasonable volume of free medical care to indigent persons. See 42 U.S.C. 291c(e). The Hill-Burton regulations exclude from the computation of the volume of free medical care "[a]ny amount which the [hospital] has received, or is entitled to receive, * * * under a governmental program." 42 C.F.R. 53.111(f)(2)(i).

Petitioners also are providers of medical services under the Medicare program, 42 U.S.C. 1395 *et seq.* Providers are reimbursed for the "reasonable costs" they incur in treating Medicare patients.[1] The "reasonable cost" of any service is defined as "the cost actually incurred," and is to be "determined in accordance with regulations" promulgated by the Secretary of Health and Human Services. 42 U.S.C. 1395x(v)(1)(A). Such regulations must "take into account * * * [providers'] direct and indirect costs," and may not impose Medicare costs on non-Medicare patients, or vice versa. *Ibid.* Medicare reimbursement is not available if the individual receiving medical care "has no legal obligation to pay" for the care or if a government entity pays "directly or indirectly" for the individual's care. 42 U.S.C. 1395y(a)(2) and (3). From the inception of the Medicare program, the Secretary's regulations expressly excluded reimbursement for "charity allowances," defined as "reductions in charges made by the provider of services because of the indigence or medical indigence of the patient." 42 C.F.R. 405.420(a) and (b)(2).

Petitioners sought Medicare reimbursement for a portion of their Hill-Burton indigent care costs, claiming that they constituted "reasonable indirect costs" of providing

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[1]This description of the Medicare cost reimbursement process applies to the period at issue in this case. Since that time, Congress has significantly revised the Medicare reimbursement scheme. See Social Security Amendments of 1983, Pub. L. No. 98-21, Tit. VI, 97 Stat. 149 *et seq.*

health care services to their Medicare patients. These claims were denied on the ground that the costs were not covered by Medicare. Petitioners then appealed to the Provider Reimbursement Review Board (PRRB). Before the PRRB rendered its decision, Congress enacted Section 106 of TEFRA. Section 106 amended the Medicare statute to state (1) that the Secretary's Medicare regulations "shall provide" that a hospital's costs in providing Hill-Burton free care to indigents are not reimbursable as "reasonable costs;" and (2) that the amendment "shall be effective" with respect to "any" costs, except those previously allowed by a final court order affirmed by a federal court of appeals. The conference report that accompanied TEFRA expressly stated that the purpose of Section 106 was merely to "clarify that Hill-Burton free care costs have never been, and are not, allowable for medicare reimbursement purposes." H.R. Rep. 97-760, 97th Cong., 2d Sess. 431 (1982). The PRRB affirmed the denials of reimbursement to petitioners on the basis of Section 106.

2. Petitioners sought judicial review of the PRRB decision in the United States District Courts for the Eastern and Middle Districts of Pennsylvania. Petitioners contended that application of Section 106 to them was unconstitutional on the ground that it (1) impaired their contractual rights; (2) took their property without just compensation; and (3) constituted invalid retroactive legislation. The district courts granted summary judgment against petitioners on all of their claims (Pet. App. 5a-17a, 19a-25a). The district courts held, inter alia, that retroactive application of TEFRA did not constitute an unconstitutional interference with petitioners' contractual rights because providers have no vested contractual right to receive Medicare reimbursement for any particular category of costs (Pet. App. 14a-15a, 21a-22a) and because, in any event, petitioners never

had a reasonable expectation of Medicare reimbursement for their Hill-Burton costs (*id.* at 16a, 22a).[2]

Petitioners consolidated their cases for purposes of appeal. In a per curiam decision (Pet. App. 1a-4a), the court of appeals affirmed the judgments of the district courts. The court of appeals noted that, with one exception, every circuit that had considered whether Hill-Burton indigent care costs were reimbursable under the Medicare statute had rejected such claims.[3] The court of appeals also noted that three circuits had squarely considered and rejected constitutional claims similar to those raised by petitioners.[4]

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[2]Several petitioners are hospital associations that joined this suit on behalf of their members. The district courts denied the Secretary's motions to dismiss those associations for lack of standing on the ground that the motions were moot. See Pet. App. 6a n.2, 25a.

[3]See *John Muir Memorial Hospital, Inc.* v. *Davis*, 726 F.2d 1443 (9th Cir. 1984); *Harper-Grace Hospitals* v. *Schweiker*, 708 F.2d 199 (6th Cir. 1983); *Catholic Medical Center* v. *New Hampshire-Vermont Hospitalization Service, Inc.*, 707 F.2d 7 (1st Cir. 1983); *Memorial Hospital* v. *Heckler*, 706 F.2d 1130, 1135-1138 (11th Cir. 1983), cert. denied, No. 83-797 (Feb. 21, 1984); *Iredell Memorial Hospital, Inc.* v. *Schweiker*, 699 F.2d 196 (4th Cir. 1983), cert. denied, No. 83-23 (Oct. 3, 1983); *Johnson County Memorial Hospital* v. *Schweiker*, 698 F.2d 1347 (7th Cir. 1983), cert. denied, No. 82-1805 (Oct. 3, 1983); *St. Mary of Nazareth Hospital Center* v. *HHS*, 698 F.2d 1337, 1342-1345 (7th Cir. 1983), cert. denied, No. 82-2152 (Oct. 3, 1983); *Metropolitan Medical Center* v. *Harris*, 693 F.2d 775 (8th Cir. 1982); *Harper-Grace Hospitals* v. *Schweiker*, 691 F.2d 808 (6th Cir. 1982). The one exception is *Presbyterian Hospital* v. *Harris*, 638 F.2d 1381, 1386-1389 (5th Cir.), cert. denied on a different issue, 454 U.S. 940 (1981), which was decided prior to the enactment of TEFRA.

[4]See *Harper-Grace Hospitals* v. *Schweiker*, 708 F.2d at 201; *Memorial Hospital* v. *Heckler*, 706 F.2d at 1136-1137; *St. Mary of Nazareth Hospital Center* v. *HHS*, 698 F.2d at 1343-1345; *Johnson County Memorial Hospital* v. *Schweiker*, 698 F.2d at 1350-1351. See also *John Muir Memorial Hospital, Inc.* v. *Davis*, 726 F.2d at 1447-1448.

3. Petitioners' challenge to the denial of Medicare reimbursement for their Hill-Burton indigent care costs is virtually identical to the contentions raised in *Johnson County Memorial Hospital* v. *Heckler*, cert. denied, No. 82-1805 (Oct. 3, 1983); *St. James Hospital* v. *Heckler*, cert. denied, No. 82-2152 (Oct. 3, 1983); and *Iredell Memorial Hospital, Inc.* v. *Secretary of Health and Human Services*, cert. denied, No. 83-23 (Oct. 3, 1983). We addressed these contentions in our briefs in opposition in *Johnson County Memorial Hospital* and *St. James Hospital*. We pointed out there that the Secretary correctly applied the Medicare statute in denying reimbursement of Hill-Burton indigent care costs; that six (now eight) courts of appeals have sustained the Secretary's position; that Section 106 of TEFRA is constitutional; and that the issue is not one of continuing importance. We refer the Court to those discussions, which establish that review of this issue is not warranted.[5] The Court denied certiorari in *Johnson County Memorial Hospital*, *St. James Hospital*, and *Iredell Memorial Hospital, Inc.* Petitioners have presented no reason that would call for a different result in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

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[5]We are providing copies of our briefs in opposition in *Johnson County Memorial Hospital*, *St. James Hospital*, and *Iredell Memorial Hospital, Inc.* to counsel for petitioners.